

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff,

Civil Action
No. 14-14176-ADB

v.

October 16, 2018

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, et al.,

Pages 1 to 92

Defendants.

TRANSCRIPT OF BENCH TRIAL - DAY 2
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on October 16, 2018.)

THE CLERK: All rise. Court is in session. Please be seated.

THE COURT: Good morning, everyone.

MR. MORTARA: Good morning, Your Honor.

THE COURT: Is Dean Fitzsimmons here?

MR. MORTARA: Your Honor, before we get started this morning, there is one housekeeping matter.

THE COURT: Yes.

MS. HACKER: We have the transcripts, Your Honor, for the majority of the witnesses that SFFA intends to call by deposition. We have a binder of the eight witnesses. If I could hand it up to Your Honor, there are a few remaining objections to testimony in these transcripts. We anticipate we may read some of these depositions tomorrow, so we wanted to hand it up to Your Honor today in case you wanted to rule on those.

THE COURT: Okay.

MS. ELLSWORTH: Your Honor, just so we're aware,

1 there are objections to at least three of the transcripts in
2 full on relevance grounds. The other objections we can work
3 out whenever counsel tries to read it in.

4 THE COURT: Three whole witnesses?

5 MS. ELLSWORTH: The entire testimony of three
6 non-parties that was taken by subpoena.

7 THE COURT: And when to you want to do that?

8 MS. ELLSWORTH: Whenever they want to read them in,
9 I suppose.

10 MS. HACKER: We can take those up as we get to
11 those witnesses in the order. So that we can just start with
12 Dean Fitzsimmons this morning.

13 THE COURT: That's fine. You can pass that up.

14 You're still under oath. Just a reminder.

15 THE WITNESS: I'm sorry?

16 THE COURT: Just a reminder that you're still under
17 oath.

18 THE WITNESS: Okay. Thank you. Good.

19 MR. HUGHES: Good morning, Your Honor.

20 THE COURT: When you're ready, Mr. Hughes.

21 (WILLIAM FITZSIMMONS previously sworn by the Deputy
22 Clerk.)

23 DIRECT EXAMINATION (resumed)

24 BY MR. HUGHES:

25 Q. Good morning, Dean Fitzsimmons.

1 **A.** Good morning.

2 **Q.** I'd like to start by talking about what happens when
3 somebody applies to Harvard. I understand that the
4 application comes in to the admissions office and is assigned
5 to a docket based on geography; is that correct?

6 **A.** That's correct.

7 **Q.** We talked about this a little yesterday. Each docket has
8 a docket chair and then several other readers who are reading
9 applications on that docket, correct?

10 **A.** Yes. Correct. Those other readers are advocates for
11 particular parts of the docket.

12 **Q.** And a given reader might read applications on more than
13 one docket, correct?

14 **A.** That's correct.

15 **Q.** That includes even the docket chairs, right?

16 **A.** That's correct.

17 **Q.** And the dockets have -- do they have roughly the same
18 number of applicants from docket to docket, or does that
19 vary?

20 **A.** It varies slightly, but that's true on the main.

21 **Q.** Each application is read in full by at least one
22 admissions officer, correct?

23 **A.** That's correct.

24 **Q.** And the first admissions officer to read an application
25 is referred to, at least sometimes, as the first reader,

1 correct?

2 **A.** Yes. That first reader would be the advocate.

3 **Q.** The first reader reads through the application, and part
4 of what that first reader does is assign some scores in
5 different categories, correct?

6 **A.** Say that again.

7 **Q.** The first reader gets the application and reads through
8 it, and part of the reader's first responsibility is to
9 assign an academic score, an extracurricular score, the
10 athletic score, a personal score, and a preliminary overall
11 rating, correct?

12 **A.** Yes. That would be one of the things that the reader
13 would do based on the evidence in the application.

14 **Q.** And the reader also might write some comments in a couple
15 of comment fields on the summary sheet. That's another thing
16 the reader could do, correct?

17 **A.** That's correct.

18 **Q.** And sometimes in the admissions office an application is
19 read in full again by another admissions officer, correct?

20 **A.** That's correct.

21 **Q.** Not all applications get that additional read, correct?

22 **A.** That's correct.

23 **Q.** Because some applications the first reader can see really
24 the applicant isn't going to make the cut, so those
25 applications don't frequently get that additional read,

1 correct?

2 **A.** Not entirely. Everyone is still in play. In other
3 words, the first reader may make a decision not at that time
4 to pass the application on to a second or perhaps to a
5 faculty reader. But all the applications are still very much
6 in play because there are lots of new pieces of information
7 coming in at all times.

8 **Q.** Okay. Focusing back on those categories where a numeric
9 score is awarded -- the academic, extracurricular, personal,
10 athletic, and preliminary overall score -- the readers score
11 those on a numeric scale from 1 being the best to 5 or 6
12 being the worst, correct?

13 **A.** That's correct.

14 THE COURT: Mr. Hughes, can you bend that
15 microphone a little closer to your mouth for me.

16 MR. HUGHES: That better?

17 THE COURT: Yes.

18 BY MR. HUGHES:

19 **Q.** So 1 is the best score you can get, correct?

20 **A.** That's correct.

21 **Q.** 5 or 6 is the worst?

22 **A.** Usually 4. A 5 might have another kind of indication;
23 for example, that a person has so many home responsibilities
24 and so many employment responsibilities that he or she is not
25 able to take part fully or at all in conventional

1 extracurricular activities, for example.

2 **Q.** Thank you for that.

3 And generally speaking, a score of 1 in any of
4 these categories is relatively rare to the other scores,
5 correct?

6 **A.** That's correct.

7 **Q.** And a score of 2 is a pretty good score that in any of
8 these categories indicates that a candidate is at least
9 somewhat competitive for admission to Harvard, correct?

10 **A.** Certainly competitive.

11 **Q.** Sometimes there are gradations in the scores. You can
12 see a 2 plus which is better than a 2, right?

13 **A.** That's correct.

14 **Q.** A 2 minus is worse than a 2, correct?

15 **A.** That's correct.

16 **Q.** You can see that up and down the scale, right?

17 **A.** Yes.

18 **Q.** So Harvard's applicant pool is very strong academically.
19 Do you agree with that?

20 **A.** Yes.

21 **Q.** So these non-academic factors -- the extracurricular, the
22 personal score -- those can be important to admission to
23 Harvard, correct?

24 **A.** That's correct.

25 **Q.** I'd like to look at Plaintiff's Exhibit 1. I'll pull

1 that up on the screen. And this is the reading procedures
2 for the class of 2018.

3 MR. HUGHES: And before I ask questions about the
4 document, I'd like to offer it into evidence.

5 MR. LEE: No objection, Your Honor.

6 THE COURT: Admitted.

7 (Plaintiff Exhibit No. 1 admitted.)

8 MR. HUGHES: Thank you, Your Honor.

9 BY MR. HUGHES:

10 Q. Dean Fitzsimmons, there's been a lot of discussion about
11 the personal score in this case, so I'd like to look at the
12 part of P1 that relates to that which I believe appears on
13 page 6. I'll pull that up.

14 Actually I'm going to go back to page 5. Can you
15 see that?

16 A. Yes.

17 Q. I've blown up the top of it. This part of Plaintiff's
18 Exhibit 1, the reading guidance gives coding guidelines for
19 the summary sheets, correct?

20 A. That's correct.

21 Q. Plaintiff's Exhibit 1 is the reading guidance that is
22 supplied each year to Harvard admissions officers who are
23 reading and scoring applications, correct?

24 A. Yes.

25 Q. Admissions office document instructing the readers on how

1 to read and score, correct?

2 **A.** That's correct.

3 **Q.** And here we've got this part of the document that we're
4 looking at on page 5 is part of the document that relates to
5 the coding guidelines for the summary sheets, correct?

6 **A.** That's correct.

7 **Q.** And the summary sheet is the document where the scoring
8 that we talked about appears. That's what the admissions
9 officer -- that's where the admissions officer records his or
10 her scores, correct?

11 **A.** Yes.

12 **Q.** So here is where Harvard is telling the admissions
13 officers how to score the various categories, correct?

14 **A.** Yes. In addition to, of course, the lengthy training
15 that takes place prior to looking at the document.

16 **Q.** Lengthy training you're talking about is when somebody
17 first joins the admissions office, the first 50 or 100 files
18 that they read, somebody else is reading those over their
19 shoulder, so to speak?

20 **A.** That's correct.

21 **Q.** Let's talk about academic. We've got at the bottom of
22 the page some instructions on how to score academics. And
23 right there we see an academic -- what it takes to get an
24 academic 1, correct?

25 **A.** Yes. In a very general way.

1 **Q.** Academic 1's are pretty rare, right?

2 **A.** They are.

3 **Q.** But here it's a determination by the admissions officer
4 that the person would likely -- would have a good chance to
5 graduate very near the top of the class at Harvard, summa,
6 right?

7 **A.** That's correct.

8 **Q.** If we go over to page 6 of Plaintiff's Exhibit 1, we've
9 got some more guidance on how to award these academic index
10 scores, correct?

11 **A.** That's correct.

12 **Q.** And for example, to get a 2, which is important to
13 admissions, there are specific guidance about the kind of SAT
14 or ACT score that the admissions officer should be looking
15 for in an applicant, correct?

16 **A.** That's correct. But it's a bit of an oversimplification
17 just to look at that. Because what we're asking people to do
18 in addition to looking at these kinds of -- such as grades
19 and standardized tests, we're actually asking our readers to
20 go through everything on that application and to try also to
21 think about growth and the future potential. Because in lots
22 of respects, we really are in the futures business. We're
23 looking at people not simply by a rigid, formulaic kind of
24 thing such as a test score.

25 **Q.** None of that is here in the guidance, correct?

1 **A.** That's correct. It would be part of the training and all
2 the extensive discussion we have in committee.

3 **Q.** What we definitely have here in the guidance between a 2
4 and a 3 is an instruction to the reader to differentiate
5 between applicants based on grades and standardized test
6 scores, correct?

7 **A.** Yes. It would be a correlation but, again, not a
8 formula.

9 **Q.** And the grades and the standardized test scores are
10 objective measures. Right?

11 **A.** We would not at all look at them as objective measures.
12 Just to give you an idea, so let's say we had one student who
13 had grown up in a very advantaged household and gone to
14 wonderful schools and had five or six years of very, very
15 expensive test prep and had enormous educational advantages.

16 And then let's take, on the other hand, someone who
17 grew up in an underresourced community in an underresourced
18 family, had not been able to attend rigorous schools that
19 would prepare a person for standardized tests, and did not
20 have the money to take advantage of any kind of lengthy and
21 expensive test prep.

22 So in those two circumstances, you -- again,
23 thinking creatively and thinking about people's actual
24 potential, you would take that kind of a thing and put it in
25 the back of your mind as you're trying to figure out what the

1 real future of that person is like. Not one standardized
2 test score is certainly not equivalent to another
3 standardized test score taken over a very different lifetime
4 of experiences.

5 **Q.** So is it the position of the Harvard admissions office
6 that you would discount the importance of a standardized test
7 score if you had evidence that a particular applicant had the
8 resources to go to significant test preparation courses?

9 **A.** Not at all. We're simply looking at the evidence sitting
10 in front of us. And there are certainly people who have had
11 many advantages who are spectacular students and would do
12 great things with their lives. So it's always trying to look
13 positively in every case and not ever look negatively. And
14 that's the way the advocate system works.

15 **Q.** I thought you just told me, Dean Fitzsimmons, that you
16 would look at test scores differently based on someone's
17 access to resources to take standardized test preparation
18 courses. Is that your testimony?

19 **A.** It would be certainly one of the factors that we would
20 look at, given the enormous amount of research out there that
21 indicates the effect of background and opportunity on
22 standardized testing.

23 **Q.** And none of that guidance appears here in P1, correct?

24 **A.** Not directly.

25 **Q.** Now, let's move on to the personal score. In P1, the

1 reader guide that your admissions officers get each year,
2 this is the sum total of the instructions in this document
3 that you give to your admissions officers about how to score
4 the personal score, correct?

5 **A.** Yes. In this document.

6 **Q.** Are there any other documents where you instruct your
7 readers in the admissions office about how to award the
8 personal score?

9 **A.** Of course the interviewer handbook, which you mentioned
10 yesterday.

11 But really what happens is through the lengthy
12 training process, and there would be many, many discussions,
13 working with actual case studies over a period of time,
14 talking with other -- say if you're a new admission officer,
15 talking with other more experienced admission officers about
16 what to look for. So it's a very, very lengthy, you know --
17 and then continuing monitoring of exactly what happens when
18 you're looking at a personal rating.

19 **Q.** Dean Fitzsimmons, I'd like to point out the interviewer
20 handbook which you mentioned in your answer. This is
21 Plaintiff's Exhibit 88 that was admitted yesterday. It's
22 page 10 of the interviewer handbook, page 12 of the exhibit.

23 Is this section that I have up here on the screen,
24 I think Mr. Lee might have shown it yesterday in opening, is
25 this the portion of the interviewer handbook that you had in

1 mind?

2 **A.** Yes. That's certainly part of it.

3 **Q.** And this language in the interviewer handbook and what we
4 looked at in P1 is the sum and substance of the written
5 instructions to admissions officers relating to the personal
6 score, correct?

7 **A.** Yes.

8 **Q.** Now I want to talk about race in the admissions process.
9 Back to Plaintiff's Exhibit 1.

10 And on the first page of Plaintiff's Exhibit 1,
11 there are instructions to admissions officers reading Harvard
12 applications about basically confirming the race or ethnicity
13 of applicants who have provided that information, correct?

14 **A.** That's correct.

15 **Q.** But there's nothing in Plaintiff's Exhibit 1 that
16 instructs admissions officers about how they are supposed to
17 use race in considering an application to Harvard, correct?

18 **A.** Let me just -- can I look just for a second?

19 **Q.** You absolutely may. If you want to flip through the
20 document, it's P1, the very first one in the binder there in
21 front of you.

22 **A.** Could you repeat the question again?

23 **Q.** The question is, we've got instructions here on the first
24 page of confirming the race or ethnicity of a given
25 applicant, but there's nothing in P1 that instructs an

1 admissions officer how they are supposed to consider race in
2 considering an application to Harvard.

3 **A.** That would be technically true, as I look at this. Let
4 me just take another quick look here because we do change
5 these on occasion. That looks correct to me.

6 **Q.** And the same is true for the alumni interviewer handbook
7 that we just looked at, Plaintiff's Exhibit 88. There's
8 nothing in there that instructs -- that provides instructions
9 about how race is supposed to be used in the review of an
10 applicant to Harvard, correct?

11 **A.** That's correct.

12 **Q.** As far as you know, there is no written guidance provided
13 to admissions officers that instructs admissions officers
14 about how they are supposed to take race into account in the
15 admissions process, correct?

16 **A.** That's correct. But of course there is an enormous
17 amount of other information that's provided.

18 **Q.** And there's certainly no guidance, written guidance, on
19 whether race can be considered one way or the other in the
20 personal score, correct?

21 **A.** In these two documents, that's correct.

22 **Q.** And anywhere else in the Harvard admissions office there
23 is no written guidance on whether or not race can be used in
24 the personal score, correct?

25 **A.** Right. The guidance is really given in a wide variety of

1 other ways.

2 **Q.** And in fact, you don't recall giving any particular
3 yearly instructions to the admissions office about how race
4 should be used, correct?

5 **A.** No. That isn't really the way it works. So one of
6 the -- I've already talked about the process for training new
7 admission officers, and that is a process that takes place
8 over many weeks and really, you could argue, right through
9 the first year.

10 But one of the things that also happens is that in
11 our orientation every year, we will have presentations by
12 counsel, for example, and we'll have discussions about the
13 current situation regarding race.

14 And then in the reading process and certainly in
15 all the committee meetings that take place, both the
16 subcommittee and the full committee, there is certainly lots
17 of information back and forth from one admission officer to
18 another, from new admission officers to senior admission
19 officers and vice versa.

20 **Q.** Dean Fitzsimmons, I'm going to put up page 236 of your
21 deposition on the screen. Starting at line 22. We asked
22 you, "Do you give any particular instruction every year to
23 the admissions office about how race should be used? "

24 Turn to page 237, you answered, "Not that I
25 recall."

1 Were you asked that question? Did you give that
2 answer?

3 **A.** Yes. And I must have been thinking about the written
4 part, but I'm not sure what was in my mind at that point.

5 MR. LEE: Can we in the interest of completeness
6 just have the next question and answer, which I think is
7 perfectly consistent with what he just testified?

8 MR. HUGHES: I'm happy to read the whole page.

9 MR. LEE: That's great.

10 MR. HUGHES: Is there a specific -- I'll blow it
11 up.

12 MR. LEE: I think the next question and answer.

13 MR. HUGHES: I think the whole page is instructive.

14 BY MR. HUGHES:

15 **Q.** "QUESTION: Is there a specific training session that
16 everyone is required to attend on a regular basis that
17 reviews what is legally permissible with respect to the use
18 of race in the admissions process?

19 "ANSWER: That really would be part of the
20 comprehensive training program.

21 "QUESTION: Are you aware that it's specifically
22 included every year on the training program?

23 "ANSWER: The intention of the training program is
24 to give a comprehensive overview of how to evaluate an
25 application.

1 "QUESTION: Is it your understanding that that
2 includes specific training on how to race should be used?

3 "ANSWER: If it isn't in writing, it could well
4 also be done in discussion.

5 "QUESTION: Are you sure that it is?

6 "ANSWER: I don't know for sure."

7 Were you asked those questions? Did you give those
8 answers?

9 **A.** I did. I think what -- there in my mind, I think, was
10 there one huge specific session.

11 The fact is that this is built into our -- as I
12 said here really in the deposition, it's built into the
13 normal training program. It really is part and parcel of
14 what we do, and it's a part of really every time we look at
15 an application. For example, in a subcommittee or in a full
16 committee, there are always examples of how race might
17 factor, say, in that particular situation.

18 **Q.** How does race factor into Harvard's admissions process?

19 **A.** For highly competitive applicants, it could be one factor
20 among many that might lead our 40-person admissions committee
21 to vote yes.

22 But race would never be seen in isolation, say
23 relative to the rest of the application. It would be part of
24 it. In some cases a person -- in many cases, in fact, would
25 have been admitted anyway without any consideration of race.

1 But it is again one part of a person's life, and
2 it's one part of a person's life that might lead that person
3 to be a great educator of others about how to be a good
4 citizen and citizen leader, not just at Harvard but later.

5 **Q.** Is race part of your holistic admissions process or your
6 whole-person review?

7 **A.** It is certainly one part of the whole-person review.

8 **Q.** And you actually think it's impossible to abuse a
9 holistic admissions process like Harvard's, correct?

10 **A.** To abuse?

11 **Q.** Yes, sir.

12 **A.** Could you repeat the question?

13 **Q.** You actually think it's impossible to abuse a holistic
14 process like Harvard's, correct?

15 **A.** I do.

16 **Q.** In fact, you are not aware that the holistic admissions
17 process at Harvard was instituted, in part, because of
18 concerns about the number of Jewish students on Harvard's
19 campus, correct?

20 **A.** That's certainly a part of history that I wasn't present
21 for. I've certainly heard the charges.

22 **Q.** I'm going to pull up page 408 of your deposition on the
23 screen, line 17.

24 "QUESTION: Are you aware of the fact that the
25 holistic admissions process at Harvard was instituted in part

1 to concerns about the number of Jewish students on campus?

2 "ANSWER: I'm not sure exactly what kind of
3 admissions process was being run at Harvard a hundred years
4 ago."

5 MR. LEE: Your Honor, immediately preceding
6 questions and answers actually tell you what he was saying.

7 "Are you aware as to the origin of Harvard's
8 holistic admissions process?

9 "ANSWER: I am aware of the holistic admissions
10 process of which I have been a part."

11 This is not proper impeachment.

12 MR. HUGHES: It is exactly the question I asked him
13 on the stand.

14 THE COURT: I'm not sure it's proper impeachment,
15 but I will sort out what is relevant and not relevant. It's
16 more efficient to let him ask and answer the question than it
17 is to think about the objection. So go ahead.

18 MR. HUGHES: We're going to move on from this
19 issue.

20 THE COURT: Perfect.

21 MR. HUGHES: I understand Your Honor's views on
22 this subject.

23 BY MR. HUGHES:

24 **Q.** Dean Fitzsimmons, let's get back to Harvard's use of race
25 in admissions today, okay?

1 **A.** Sure.

2 **Q.** Since you have been dean, the way Harvard uses race in
3 admissions has not changed, correct?

4 **A.** That's correct.

5 **Q.** In fact, you say the way Harvard uses race has not
6 changed since the filing of this lawsuit, correct?

7 **A.** That's correct.

8 **Q.** And in fact, you don't recall any specific discussion
9 about a staff member using race inappropriately, correct?

10 **A.** That's correct.

11 **Q.** And you don't recall any discussions with any staff
12 members about concerns that race was not being used
13 consistently with Harvard's guidelines, correct?

14 **A.** That's correct.

15 **Q.** And Harvard considers the race of an applicant even in
16 instances where the applicant does not indicate in their
17 application materials that race provided a particular
18 experience or influenced some part of their background,
19 correct?

20 **A.** I'm not sure how that applies to a particular case.
21 Could you just repeat the question? Maybe I don't quite
22 understand it.

23 **Q.** Sure. Harvard considers the race of an applicant even in
24 instances where the applicant does not indicate in their
25 application materials that race provided a particular

1 experience or influenced some part of their background?

2 **A.** I'm still having trouble a little bit understanding the
3 thrust of the question.

4 But we certainly -- we are aware -- if people
5 choose to let us know through the common application, we
6 would know they are from a minority background. Beyond that,
7 it really depends. Each case really depends on how that
8 person's life has been lived.

9 But I think we're always -- because the nub of what
10 we do is literally 40 people looking at one person at a time
11 and looking to see all the different factors which would
12 include race in that person's life. I hope I'm answering
13 your question. I'm not sure I still understand it.

14 **Q.** This was discussed last time you were under oath. So if
15 an applicant provides their race or ethnicity in the common
16 application, Harvard will have that information, correct?

17 **A.** That's correct.

18 **Q.** Okay. And then that applicant could choose to write
19 about in an essay or a teacher could write about in a
20 recommendation some experience in that applicant's life that
21 relates to or has to do with their race or ethnicity,
22 correct?

23 **A.** That's true. They could choose to do that. The teachers
24 could choose to write about it.

25 **Q.** But even in circumstances where you have the applicant's

1 racial or ethnic information but they don't write about
2 whether that's important to them and the teachers don't say
3 anything about them, you still consider the race of the
4 applicant in those situations as part of your whole-person
5 review process, correct?

6 **A.** Yes. We would still know about it, and it would still be
7 there. Whether or not the race of the applicant would lead
8 someone to vote for that person really depends on all the
9 other factors. Again, looking at people who are fully
10 competitive.

11 **Q.** Let me just ask you, is Harvard's use of race as a factor
12 in the admissions process limited only to those applicants
13 who say in their application materials that race provided a
14 particular experience or influenced some part of their
15 background as they were growing up?

16 **A.** If I understand your question, there's no requirement
17 that students would have to write about their background.
18 That still might mean that even if they didn't write about
19 their racial or cultural or ethnic background, that would
20 still be in the application.

21 **Q.** And Harvard would still use race as a factor in the
22 admissions process for those applicants, correct?

23 **A.** Again, race is never going to be used in isolation. So
24 I'm not quite sure what the -- maybe I'm misunderstanding
25 where you're going with it. We would know about it, but I am

1 not sure exactly what you want me to answer, I guess.

2 **Q.** I'm just trying to see if we can get on the same page we
3 were on in your deposition. I've got page 86, line 6 through
4 13 pulled up on the screen.

5 "QUESTION: Is Harvard's use of race as a factor in
6 the admissions process limited only to those applicants who
7 say in their application materials that race provided a
8 particular experience or influenced some part of their
9 background as they were growing up?

10 "ANSWER: No."

11 That was your testimony at your deposition,
12 correct?

13 **A.** Yes. And I'm still having a little trouble trying to
14 think about it in juxtaposition of a single case. We would
15 always know what the person's race was if the person wanted
16 to tell us about it.

17 **Q.** You're not disagreeing with your testimony from your
18 deposition, correct?

19 **A.** Could you just repeat again exactly what you're -- is
20 this the question --

21 **Q.** I've already asked the question word for word, and you
22 can read it there.

23 **A.** Right.

24 **Q.** I'm just trying to see if we're on the same page that as
25 a general matter in the admissions process to Harvard you

1 consider the race of an applicant -- your consideration of
2 race of an applicant is not limited to applicants who write
3 about their race or ethnicity?

4 **A.** Yes. I think I answered that question.

5 **Q.** That's exactly consistent with what we've got on the
6 screen, correct?

7 **A.** Yes.

8 **Q.** Now, why does Harvard consider race in its admissions
9 process?

10 **A.** The major thing really is one of the best things about
11 going to any college, including Harvard -- and as you know,
12 Harvard is almost entirely residential -- is the opportunity
13 to learn from fellow classmates. Mr. Lee talked in his
14 opening remarks about how critical that kind of piece of
15 education can be.

16 One of the things that was certainly a huge part of
17 my education was learning from roommates, learning from
18 people in dining halls, learning from people in
19 extracurricular activities, in smaller classes, literally
20 24 hours a day, about who they were, what their backgrounds
21 were.

22 I certainly think that in a country that is so
23 divided along racial and ethnic lines as ours is and with
24 demographics for the future that suggest an even more
25 critical role for race and ethnicity in the United States

1 that the opportunity for our undergraduates to learn from
2 people from every possible background, including racial and
3 ethnic backgrounds, is a critical part. Not just of making a
4 difference to their own classmates during college, affecting
5 perhaps even how they would use the college experience.

6 Maybe they -- as a result of getting to know people
7 from different ethnic and racial backgrounds, they might
8 decide to take different courses from the ones they might
9 ordinarily have. Or they might also go to lectures or take
10 part in activities of various kinds so that they would learn
11 a great deal more about what the country is really like.

12 That, in our view would make people much better
13 citizens and citizen leaders, again not just during Harvard
14 but we hope throughout the rest of their lives in a world
15 that race and ethnicity certainly seems to be, perhaps will
16 be even more important in the decades ahead as our students
17 live out their lives.

18 **Q.** Thank you for that answer, Dean Fitzsimmons.

19 Just trying to get some shorthand, which I think
20 many people have used both in the context of this case and
21 outside the context much this case, one of the reasons
22 Harvard is considering race in its admissions process is to
23 achieve a racially diverse class, which you say results in
24 all of the benefits that you just testified to, correct?

25 **A.** We do believe that diversity of all kinds is very

1 important in terms of what our students learn over the four
2 years and how they'll live their lives, we hope for the
3 public good.

4 **Q.** Is there a way you can measure a particular level or
5 quantity of racially diversity that Harvard thinks is needed
6 to obtain all the benefits that you just described for us?

7 **A.** No. It's just like the admissions process. There are no
8 formulas. There are no sort of numerical guidelines that
9 would do justice to anything like that. It just isn't that
10 simple.

11 **Q.** If the racial diversity of Harvard's classes from year to
12 year bounced around significantly, you could still achieve
13 potentially the benefits of diversity that you just described
14 for us?

15 **A.** Well, I think it depends a little bit on the degree. If
16 you attended the Harvard I attended where there were
17 virtually no students of color -- and for that matter 4 to 1
18 male-female ratio -- it was a very, very different world.
19 And I know learned much, much less about what was going on in
20 the world than our undergraduates do today.

21 I just know from the fact because we do financial
22 aid and student employment as well as admissions, we have
23 lots of student recruiters, as you know. So we know our
24 undergraduates well. I would simply say my own life has been
25 enormously enriched by the opportunity to get to know our

1 students over the past four decades, including I noticed even
2 Jeannie Park, who is here with us today, was one of our key
3 student recruiters when she was an undergraduate.

4 **Q.** I'd like to shift gears a little bit, Dean Fitzsimmons,
5 and talk about the importance of race in the admissions
6 process; in other words, how important race is to whether or
7 not a given applicant gets into Harvard.

8 And my question is, would you agree that race is a
9 determinative factor for about half of the African-Americans
10 admitted to Harvard and about a third of Hispanics in recent
11 admissions cycles?

12 **A.** I'm not sure that I would use the word "determinative,"
13 again because it implies that race would be used in isolation
14 and separate from all the other factors that go into choosing
15 among very competitive applicants.

16 But certainly race was a help in terms of some
17 portion of the people, again when all other factors were
18 substantially equal.

19 **Q.** I'd like to explore that with you now. I'm going to put
20 on the screen Plaintiff's Exhibit 316. I'm going to blow up
21 the top so you can see it before I ask questions.

22 MR. HUGHES: I'd like to offer P316 into evidence.

23 MR. LEE: No objection, Your Honor.

24 THE COURT: It's admitted.

25 (Plaintiff Exhibit No. 316 admitted.)

1 BY MR. HUGHES:

2 Q. Dean Fitzsimmons, you're familiar with Plaintiff's
3 Exhibit 316, correct?

4 A. I am.

5 Q. Plaintiff's Exhibit 316 is a report of a committee to
6 study race-neutral alternatives at Harvard, correct?

7 A. That's correct.

8 Q. And the committee consisted of you, Dean Smith --
9 Who is your boss, right?

10 A. Yes.

11 Q. -- and Dean Khurana, right?

12 A. Yes.

13 Q. Dean Khurana isn't part of the admissions process at
14 Harvard. He does something else, right?

15 A. He is a member of our committee, of our faculty committee
16 actually.

17 Q. So that means he might read materials from a particular
18 applicant from time to time?

19 A. That could happen.

20 Q. Anything else?

21 A. He could certainly attend meetings.

22 Q. Committee meetings?

23 A. No. He's been very busy with his new duties, relatively
24 new duties and lots of things.

25 Q. He's not significantly involved in the admissions

1 process?

2 **A.** Not on a day-to-day basis.

3 **Q.** Now, to be clear, this is Harvard's report, nothing to do
4 with Students For Fair Admission, correct?

5 **A.** That's correct.

6 **Q.** I want to turn to page 3. Part of what you did, your
7 committee did here is you looked at some of the work that was
8 performed by some of the experts in this case, correct?

9 **A.** That's correct.

10 **Q.** Okay. And one of the expert's work that you looked at
11 was Harvard's expert Dr. Card, correct?

12 **A.** That's correct.

13 **Q.** And the other expert that you looks at was SFFA's expert
14 Mr. Kahlenberg, correct?

15 **A.** That's correct.

16 **Q.** And you knew who Mr. Kahlenberg was before this committee
17 was formed, right?

18 **A.** That's correct.

19 **Q.** In fact, you're familiar with a book that he edited,
20 called "Rewarding Strivers." You put a blurb on the back of
21 that book, right?

22 **A.** Yes.

23 **Q.** I'd like to read that, what you said.

24 MR. LEE: Your Honor, I'm not sure what we're
25 doing. It's not a disclosed exhibit and surely not

1 impeachment.

2 MR. HUGHES: I'm just going to ask him if he
3 agrees. I'm not offering it into evidence.

4 MR. LEE: There's a reason for the disclosures of
5 the exhibits. But Your Honor can consider it.

6 THE COURT: Do you want to take a minute to look at
7 it?

8 MR. HUGHES: Do you want to look at it?

9 MR. LEE: No.

10 THE COURT: Why wasn't it disclosed?

11 MR. HUGHES: The disclosure agreement relates to
12 exhibits that we're planning to offer into evidence. I'm not
13 planning to offer it into evidence. That's our agreement
14 with them.

15 MR. LEE: Your Honor, I don't want to slow us down.
16 The agreement is you disclose anything other than that which
17 you're using for impeachment, so demonstratives are
18 disclosed, exhibits are disclosed. There's nothing to
19 impeach here.

20 THE WITNESS: I would --

21 THE COURT: Hold on for a second.

22 You can read it to him and ask him if he agrees.
23 You're parsing a mighty fine line between what is shared and
24 was not. So if there's things that you intend on using in
25 the days to come, why don't you show them to him before we

1 get going.

2 MR. HUGHES: We will certainly abide by Your
3 Honor's instruction. Thank you, Your Honor.

4 BY MR. HUGHES:

5 Q. Dean Fitzsimmons, could you agree that The Century
6 Foundation continues its trailblazing mission to prevent the
7 tragic waste of human talent that threatens America's future.
8 "Rewarding Strivers" presents provocative research and
9 analysis that provides a blueprint for the way forward?

10 A. Again, I would -- it would certainly have been better for
11 me to have seen the full context for me to look once again at
12 the book. I'm not sure what the publication date was. And
13 again, the context for that blurb that I wrote. And also,
14 frankly, for me to see how well that report perhaps as how
15 good it looks today in terms of what we know about
16 admissions.

17 Q. Thanks, Dean Fitzsimmons. We can move on to page 8 of
18 your report by the race-neutral alternatives committee. I've
19 got that blown up on the screen. This is the section of the
20 report that talks about -- we've got it at the top here --
21 "What would happen if Harvard stopped considering race?"
22 Correct?

23 A. That's correct.

24 Q. And Harvard's report says, "The committee considered as
25 an initial matter the likely effect on Harvard's student body

1 if it were to stop considering race in its admissions process
2 while continuing to engage in the other practices in pursuit
3 of diversity described above. As the expert report submitted
4 by one of Harvard's experts in the SFFA litigation, Professor
5 David Card, explains, the number of African-American and
6 Hispanic students on campus would decline dramatically,
7 notwithstanding all the other efforts that Harvard takes to
8 recruit a broadly diverse class.

9 "Specifically, Professor Card estimates that the
10 elimination of race in its race-conscious admissions program
11 would reduce the population of students who self-identify as
12 African-American, Hispanic, or other racial or ethnic
13 background by nearly 50 percent. Relative to the admitted
14 class of 2019, for example, the proportion of
15 African-American students would be expected to drop from 14
16 to 6 percent and the proportion of Hispanic or other students
17 would be expected to drop from 14 to 9 percent. This
18 decrease would produce a corresponding increase in students
19 of other races, primarily white students."

20 Do you see that?

21 **A.** I do.

22 **Q.** And what I just read is Harvard's position on what would
23 happen if Harvard stopped using race in its admissions
24 process, correct?

25 **A.** That's correct.

1 **Q.** Okay. And I want to talk a little bit about -- we talked
2 before about whether or not race is determine -- a
3 determinative factor.

4 Do you remember we had that discussion?

5 **A.** Yes. A factor.

6 **Q.** A factor. But according to Harvard's own report here,
7 without race a large number of students would not be admitted
8 to Harvard, correct?

9 **A.** That's correct.

10 **Q.** And for those students, at least, race is a determinative
11 factor, correct?

12 **A.** It certainly made a difference in whether or not they
13 were admitted, again all other things equal relative to lots
14 of other highly qualified candidates.

15 **Q.** On average, Harvard admits about 2,000 students a year;
16 is that right?

17 **A.** That's right, yep.

18 **Q.** So if we're looking at Dr. Card's -- your report of
19 Dr. Card's analysis of 2019 in the actual admitted class,
20 that class had about 14 percent African-American admits,
21 correct?

22 **A.** I think that's true, yes.

23 **Q.** That would be about 280 students, correct?

24 **A.** I'll trust your math.

25 **Q.** And if that drops to 6 percent, that 280 drops to about

1 120, correct?

2 **A.** Again, you were probably a math major.

3 **Q.** No, sir. We could do the same math for the drop for the
4 Hispanic students as well, correct?

5 **A.** Correct.

6 **Q.** The report here says that the decrease would produce a
7 corresponding increase of students from other races,
8 primarily white students, but other races would benefit as
9 well, correct?

10 **A.** That would be true.

11 **Q.** And what other race would benefit if Harvard stopped
12 considering the use of race in its admissions process?

13 **A.** It doesn't say here, but I presume it would be
14 Asian-American and people from backgrounds who did not
15 declare, which is a reasonably large number, at least in
16 terms of the counting process.

17 **Q.** Let's look at the part of Dr. Card's report that presents
18 the information about this 2019 deal, put that on the screen.

19 MR. LEE: Does he have a copy of the report?

20 MR. HUGHES: No, I don't think he does. Bill, if
21 he has an issue, we can come back to it after a break.

22 MR. LEE: Can he get a chance to get his report?

23 MR. HUGHES: Sure.

24 MR. LEE: Which report?

25 MR. HUGHES: It's his first report. It is page --

1 MR. LEE: -- 108.

2 THE COURT: Do you have it?

3 MR. LEE: I don't have it. Mr. Hughes has
4 represented that he has two questions.

5 My real concern is this was not disclosed for use
6 with this witness, again. This is a document -- it's a
7 report by another expert. It was not disclosed for use with
8 this witness. That's the trouble. That's really why we
9 don't have it here.

10 MR. HUGHES: It was shown yesterday in opening
11 statements.

12 THE COURT: Is the arrangement that you're going to
13 share all the exhibits that are to be used with a particular
14 witness before that witness takes the stand?

15 MR. HUGHES: We have an arrangement to share
16 exhibits we intend to -- not admitted exhibits that we intend
17 to offer through a witness, which we've done, and
18 demonstrative. All this is, this is not demonstrative, this
19 is their expert's report. This is the table that provides
20 the precise data that we just looking at on page 8 of the
21 race-neutral alternatives report.

22 And all I want to do is he said he assumed that
23 Asian-Americans would benefit from getting rid of race. I
24 just want to show him that's what Dr. Card said, and then
25 I'll move on.

1 MR. LEE: Your Honor, I have it. If that's all he
2 wants to do, in the interests of time.

3 THE COURT: We've already had a discussion that
4 you'll be more careful about identifying what you're going to
5 use with the witness. Unless we run into some kind of
6 roadblock on this, ask the questions you're going to ask.
7 And if there's a problem, we'll circle back to it.

8 MR. HUGHES: Thank you, Your Honor.

9 BY MR. HUGHES:

10 Q. Dean Fitzsimmons, you see over here on the far left
11 hand --

12 [Alarm system goes off in Federal Courthouse.]

13 THE COURT: They'll give us a voice in a minute
14 that will tell us what we're doing. All right. Karen is
15 telling us if the voice is not telling us to stay, we have to
16 go. Murphy's law.

17 (Off the record.)

18 THE COURT: Sorry about that, everyone. It's
19 Murphy's law, right? If it can go wrong, it will. So we
20 will forego our usual morning break and we'll go straight
21 through until like 1:15 or 1:20 when you find a stopping
22 spot. Okay?

23 MR. HUGHES: Thank you, Your Honor.

24 BY MR. HUGHES:

25 Q. Welcome back, Dean Fitzsimmons.

1 **A.** Thank you very much. And to you.

2 **Q.** Just to reorient where we were, I'm going to go back few
3 questions just to remind you where we were. We had been
4 looking at Plaintiff's Exhibit 316, which is Harvard's report
5 on the race neutral alternatives.

6 Do you recall our conversation about that exhibit?

7 **A.** I do.

8 **Q.** I want to orient up to the bottom where I've got
9 highlighted here. In your report, you reference the work of
10 Dr. Card, correct?

11 **A.** That's correct.

12 **Q.** And he does a model about what the class of 2019 would
13 look like if Harvard stopped considering race, correct?

14 **A.** That's correct.

15 **Q.** And I now just want you to focus on these figures because
16 I'm going to show you Dr. Card's bar graph that relates to
17 these in a minute.

18 And according to his model, the number of
19 African-American students would have dropped from 14 percent
20 to 6 percent, Hispanics from 14 to 9 percent, correct?

21 **A.** That's correct.

22 **Q.** Okay. So now we'll go to what I had on the screen when
23 the alarm went off. Hopefully it won't cause it to go off
24 again.

25 And this is page 109 of Dr. Card's report. And if

1 you see on the left-hand side, we've got a column that says
2 "Actual Admitted Class."

3 Do you see that?

4 MR. LEE: I think that's page 108.

5 MR. HUGHES: You're right, Mr. Lee.

6 BY MR. HUGHES:

7 Q. Do you see on the left-hand column it's got the actual
8 admitted class?

9 A. I see that.

10 Q. And it's got the percentages of different ethnic or
11 racial groups, correct?

12 A. That's correct.

13 Q. And we've got the color blue for African-American. That
14 goes from 14 to 6, just like in your report, correct?

15 A. That's correct.

16 Q. And for Hispanics, which Dr. Card used yellow, it goes
17 from 14 to 9, just like in your report, correct?

18 A. Correct.

19 Q. For red -- for Asian-Americans, if Harvard were to stop
20 considering race, the Asian admissions would actually go up
21 from 24 to 27 percent, correct?

22 A. That's correct.

23 Q. So I just want to make sure we can agree on a few basic
24 things.

25 THE COURT: Can you put that back up for me? Just

1 leave it up there for a second. Keep going.

2 MR. HUGHES: Absolutely.

3 BY MR. HUGHES:

4 Q. Just a few basic things that are illustrated by both P316
5 and Dr. Card's bar graph here.

6 Asian-Americans, Dean Fitzsimmons, as a group do
7 not benefit from Harvard's use of race in terms of how many
8 Asian-Americans are admitted in a given class, correct?

9 A. Just looking across, could you just go through the line
10 of reasoning? So the 24 versus all the other reds across?

11 Q. All the other reds have to do with models about
12 socioeconomic boosts that have nothing to do with my question
13 or what you're talking about in P316.

14 A. Okay.

15 Q. I'm just focused on the first two columns, which is
16 Column 1 is "Actual Admitted Class," Column 2 is removing
17 consideration of race.

18 You've already agreed that the numbers I've shown
19 you here for African-Americans and Hispanic applicants line
20 up with that paragraph I've showed you from your report,
21 correct?

22 A. That's correct.

23 Q. And we see that the Asian admissions go from 24 in the
24 actual class up to 27 when you remove race, correct?

25 A. That's correct.

1 **Q.** So my question is Asian-Americans, as a group, do not
2 benefit from Harvard's use of race in terms of how many
3 Asian-Americans are admitted in a given class, correct?

4 **A.** Not in the number except that I think that the education
5 that the Asian-American students get as a result of being at
6 Harvard and being at a place that has great racial and ethnic
7 diversity is quite substantial.

8 **Q.** I understand your testimony on that benefit, Dean
9 Fitzsimmons, but I'm focused on the number. And on the
10 number, the number of Asian-Americans that are admitted to
11 Harvard, Asian-Americans do not benefit in terms of getting
12 into Harvard because of Harvard's consideration of race,
13 correct?

14 **A.** Yes. Except certainly there are certainly some
15 Asian-Americans who end up at Harvard themselves because
16 their background was a factor in their admissions in a
17 positive way.

18 **Q.** But as a group, according to Dr. Card, actually more
19 Asian-Americans would be admitted if race weren't considered,
20 correct?

21 **A.** That would be correct.

22 **Q.** The other thing I wanted to focus on -- and this we can
23 go right back to your document -- the preference, the racial
24 tip that African-Americans receive is relatively stronger
25 than, more than the tip that Hispanic applicants receive.

1 Would you agree with that?

2 **A.** I think I would just simply say again looking at
3 individual cases you can add these numbers up afterwards, but
4 again, the racial and ethnic background would be a factor in
5 those cases.

6 **Q.** I'm trying to look at the math that you adopted in your
7 report, and I'll ask you the question. According to the
8 numbers in your report, the falloff for African-Americans, 14
9 to 6, is greater than the falloff for Hispanics, 14 to 9, if
10 Harvard were to stop considering race, correct?

11 **A.** I understand the numbers, yes.

12 **Q.** The reverse is therefore true that as a group
13 African-Americans receive more of a benefit based on race in
14 the Harvard admissions process than Hispanics, correct?

15 **A.** Yes. There are more individuals who had benefited in
16 this individual review.

17 **Q.** Now I want to shift gears a little bit, Dean Fitzsimmons,
18 and talk to you some more about the personal score. Okay?

19 **A.** Yes.

20 **Q.** We can take this down. Would you agree that Harvard
21 admissions officers do not take race into account when
22 assigning the personal rating?

23 **A.** Yes, I do.

24 **Q.** And what that means is that race is not involved in the
25 personal rating, correct?

1 **A.** Not per se, correct.

2 **Q.** And we've talked about guidance, written guidance. Can
3 you think of anywhere where Harvard provides written guidance
4 telling its admissions officers not to use race or ethnicity
5 in awarding the personal score?

6 **A.** I have not seen any written guidance, but it's certainly
7 well known on the staff and part of the training.

8 **Q.** So I understand you say Harvard does not use race now
9 when awarding the personal score.

10 My question is, when did Harvard admissions
11 officers stop using race or ethnicity in awarding personal
12 scores?

13 MR. LEE: I object to the predicate. There's been
14 no demonstration of the predicate.

15 THE COURT: That's sustained.

16 MR. HUGHES: I'll rephrase.

17 BY MR. HUGHES:

18 **Q.** Since you've been dean, have Harvard admissions officers
19 ever used race in awarding personal scores?

20 **A.** Not to my knowledge.

21 **Q.** Yesterday, you and I had a reasonably lengthy
22 conversation about the OCR statement of findings.

23 Do you recall that?

24 **A.** Yes, I do.

25 **Q.** We had a back-and-forth. I just want to kind of refresh

1 everybody's memory where you described that process.

2 It was a lengthy investigation. They set up shop
3 in your office. They interviewed you and Director McGrath
4 and a number of other admissions officers in the course of
5 their investigation, correct?

6 **A.** That's correct.

7 **Q.** So -- and part of what the OCR did when it was conducting
8 this investigation was it got an understanding of how your
9 admissions process works, correct?

10 **A.** I think it did.

11 **Q.** And it did that in part based on the conversations with
12 you and other people in the admissions office, correct?

13 **A.** In part, yes. Correct.

14 **Q.** I just want to look at parts of Plaintiff's Exhibit 555,
15 which has already been admitted into evidence, which is the
16 statement of findings from OCR. Okay?

17 **A.** Yes.

18 **Q.** So I'm looking, Dean Fitzsimmons, at page 6 of
19 Plaintiff's Exhibit 555, the statement of findings. And I'll
20 blow up this part of OCR's report. Here OCR is reporting
21 what you and I have already discussed at length that there
22 are four major criteria on which all candidates are assessed:
23 academic achievement, extracurricular activities, athletics,
24 and personal qualities.

25 That's part of what OCR learned when it was

1 conducting this investigation, correct?

2 **A.** That's correct.

3 **Q.** OCR also as part of this investigation, since it had to
4 do with claims of racial discrimination, they investigated
5 how race was being used by the Harvard's admissions office in
6 the application process, correct? That's part of what they
7 looked at?

8 **A.** That's correct.

9 **Q.** Now I want to show you the part of the OCR's statement of
10 findings that addresses that. Okay?

11 **A.** Sure.

12 **Q.** Now what I've got on the screen is the bottom of page 15
13 and the top of page 16 of the report, which is P555. And let
14 me read that into the record, dean Fitzsimmons, and I'll ask
15 you some questions.

16 This is OCR: "We found that the readers had
17 several different views as to where and whether
18 Asian-American ethnicity was given positive weight or a tip
19 in the admissions process. Some readers explained that when
20 ethnicity was deemed to be a significant factor in an
21 application, it was reflected in the POR" --

22 And I'll pause right there.

23 POR is preliminary overall rating, correct?

24 **A.** Correct.

25 **Q.** -- "it was reflected in the POR and during discussions at

1 subcommittee and committee meetings.

2 "Other readers indicated that ethnicity was a
3 factor considered throughout the entire admissions process.
4 They stated that it could be reflected in the four reader
5 rating areas, as well as in the POR and during the
6 subcommittee and committee meeting discussions.

7 "Still other readers stated that ethnicity was not
8 a factor at all unless the effect of that ethnicity on the
9 applicant was evident from the applicant's file. They
10 indicated that ethnicity was only considered a plus when the
11 applicant wrote about or indicated the significance of his or
12 her heritage, or when there was some other indicia in the
13 file of the applicant's involvement with ethnic community
14 organizations or groups."

15 That's what OCR found, correct?

16 **A.** That's one of their findings, yes.

17 **Q.** And you told me yesterday that you and Director McGrath
18 and the other admissions officers that talked to OCR and
19 Mr. Hibino were honest and accurate when they described how
20 the process worked, correct?

21 **A.** I certainly believe that they were honest and accurate in
22 terms of the information they received.

23 **Q.** And so the date of this is 1990, correct?

24 **A.** That's correct.

25 **Q.** So at least in 1990, there was a group of Harvard

1 admissions officers that stated that race or ethnicity could
2 be reflected in the four reader rating areas, correct?

3 **A.** Yes. That's what it said.

4 But I think, again, let's give you an example. So
5 let's say someone who was from, let's say, an
6 African-American background had experienced discrimination of
7 one sort or a set of hurdles for a variety of reasons due to
8 ethnicity in their home, in their high school, in their
9 community. The fact that had overcome and surmounted those
10 kinds of obstacles could, in fact, have illuminated the
11 strength of the personal rating.

12 Now, that could happen to someone from any ethnic
13 background. It depends, I think, on how you read that
14 question. In other words, wasn't anyone from any ethnic
15 background or, say, gender or religion could be, let's say,
16 discriminated against. And then due to their background --
17 and so that is -- and that might illuminate the strength of
18 their personal qualities. So it really depends a little bit
19 on how you want to read that.

20 **Q.** Let's break this down, Dean Fitzsimmons. The four reader
21 rating areas that I've got highlighted here, one of those is
22 personal quality, correct?

23 **A.** That's correct.

24 **Q.** What you just testified to is that sometimes Harvard
25 admissions officers might consider the fact that somebody's

1 overcome discrimination as part of awarding their score,
2 correct?

3 **A.** That's correct. And it could be someone from any kind of
4 a background. It doesn't have to be connected to race or
5 ethnicity.

6 **Q.** We're talking about race. And you're trying to interpret
7 the sentences I have highlighted here and suggest that what
8 that could really mean is that if the applicant provided
9 Harvard information about overcoming racial discrimination,
10 then that could play a role in the scores, correct?

11 **A.** Yes. Except what I'm trying to say, it depends on how
12 the phrase be reflected, could be read any number of ways.

13 But the rubric is that it per se would not affect
14 the personal rating. It depends on the circumstance of the
15 individual.

16 **Q.** What OCR found was that a group of readers indicated that
17 ethnicity was a factor considered throughout the entire
18 admissions process and could be reflected in the personal
19 score. That's what they found, correct?

20 **A.** Yes. Just even on the first part of the sentence,
21 though, is that again the readings take place, the
22 subcommittee takes place, the full committee takes place. So
23 race certainly could be discussed all the way along the line
24 and be a factor, let's say, in the final vote.

25 Even if you take the first part of that sentence,

1 you can see that the ethnicity can be a factor in individual
2 cases all the way down to the final committee vote.

3 **Q.** And these readers told OCR that race could be reflected
4 in the four reader areas, which includes the personal score,
5 correct?

6 **A.** Again, I've tried, I think, to explain how the
7 individual's background -- it could be religion, could be
8 gender, could be anything, could -- and overcoming obstacles
9 or prejudice or whatever it might be, that could illuminate
10 in that individual case the personal qualities rating.

11 **Q.** The Harvard admissions office would only know the
12 information you just talked about if it was in the
13 applicant's file, correct?

14 **A.** That would be correct, for individual circumstances.

15 **Q.** Do you agree that OCR drew a distinction between readers
16 who consider ethnicity throughout the process and use it in
17 awarding the reader ratings; and other readers, still other
18 readers, stated that ethnicity was not a factor at all unless
19 the effect of that ethnicity on the applicant was evident
20 from the applicant's file? Do you agree OCR is drawing the
21 distinction between those two types of readers?

22 **A.** Again, I wasn't part of the conversations that the
23 readers at that time -- it was almost 30 years ago -- had
24 with the OCR people. But I think, you know, depending on how
25 the discussion took place with those readers, I think you --

1 and depending on the context of the particular case, I could
2 see how you could interpret these things in a number of
3 different ways.

4 **Q.** One way we can interpret what OCR found is that there
5 were a group of readers in Harvard's admissions office in
6 1990 who were using race and awarding personal scores.
7 That's one fair interpretation of this document, correct?

8 **A.** It's possible.

9 **Q.** And you agree it's possible that that's actually what was
10 happening in 1990, correct?

11 **A.** Again depending on how you want to read that sentence.

12 **Q.** I want to walk through a couple other parts of this that
13 relate to this issue.

14 Are you aware that in this document that OCR found
15 that Harvard did not provide its admissions officers
16 instructions on how much weight to give race or where to use
17 it in the process?

18 **A.** Again, I think you're referring to written instructions.
19 And I certainly would argue, based on the extensive training
20 and the fact that this is monitored all the time, not just
21 for the first year of a staff member's time, but in a sense
22 one of the great checks and balances is we're all watching
23 each other, all 40 people. When we look at those individuals
24 and all the information in the cases, everyone is always
25 vigilant to be certain that race and ethnicity is used in the

1 proper way.

2 **Q.** OCR became familiar not only with your written
3 instructions but also -- let's take this down until I'm
4 ready.

5 OCR became familiar not only with your written
6 instructions but also with the process that you've had since
7 you've been dean where there's this training where somebody
8 is reading over your shoulder, so to speak, when you first
9 start in the admissions office, right?

10 **A.** Yes. In a sense, we're always reading over everyone
11 else's shoulders. Because every time you put, as we do, all
12 that information up on the screen during the subcommittee and
13 the full committee, everyone is watching everybody else to be
14 sure that each applicant is being dealt with fairly.

15 **Q.** And OCR knew all about that when it issued this report,
16 correct?

17 **A.** You know, I don't know exactly what was in their minds,
18 but they certainly talked to ten admission officers, as you
19 know, and we talked about the 400 cases that they looked at,
20 and they had other information.

21 **Q.** So now I want to look at what the OCR found about
22 training. I'm focused here on the bottom.

23 "There are no formulas or specific criteria for
24 measuring or assessing ethnicity, nor are there instructions
25 for determining how much weight is given to ethnicity or

1 where the weight is to be applied in the admissions process."

2 That's what OCR found in 1990, correct?

3 **A.** Yes. And I think the fact that there was no formula, no
4 mechanical process that would in some rigid way do this, I
5 think is one of the strengths of the process. Because each
6 individual is unique in the world, and how one's background
7 may affect one's life or one's life chances or life
8 experiences is unique to that individual. So I think it is
9 important to have no formula or some mechanistic thing that
10 would do that.

11 **Q.** Let's set aside formulas and mechanistic things.

12 Do you think it's important to have instructions
13 for determining how much weight to give to ethnicity or where
14 the weight should be applied in the admissions process? Is
15 it important to have instructions on that?

16 **A.** I agree not only instructions but, again, to have an
17 ongoing process that provides checks and balances not just
18 for new people but for everyone.

19 **Q.** And right here we have OCR finding, based on their
20 lengthy investigation that we heard about yesterday, that
21 there aren't such instructions or at least there weren't in
22 1990, correct?

23 **A.** If you mean a rigid set of formulaic instructions, that
24 would be correct.

25 **Q.** Is that how you read the second part of this sentence, to

1 be referring to a rigid set of formulaic instructions? Is
2 that how you're reading it, sir?

3 **A.** I guess when I see formulas connected to instructions, it
4 leads me at least to think that there could be something
5 mechanistic or rigid or formulaic, which is not what we do.

6 **Q.** Now, are you aware that at the time of this report that
7 OCR found that Asian-Americans were receiving lower personal
8 scores than white applicants?

9 **A.** Again in general, I think there was a slight difference
10 between the personal ratings for Asian-Americans compared to
11 white students.

12 **Q.** I've got page 21 of the OCR report up on the screen. OCR
13 found, "With respect to the personal qualities ratings, most
14 applicants in our sample, both Asian-American and white, were
15 given between a three minus and a two plus. Overall, in the
16 classes of 1991 and 1992, from which our file samples were
17 drawn, over 98 percent of the applications received some form
18 of a 2 or 3. However, between the two groups, 20 percent of
19 Asian-American applicants and 25.5 percent of white
20 applicants received a 2 rating in the personal category."

21 Do you see that?

22 **A.** I can see that.

23 **Q.** And you were aware of that in 1990, correct?

24 **A.** That's correct.

25 **Q.** Did that give you any concern that there was such a stark

1 difference in personal quality ratings between Asian-American
2 applicants and white applicants in 1990?

3 **A.** I think obviously any time you see anything about our
4 applicant pool, you want to make sure that everyone is being
5 treated fairly and evenly. I think one of the things that
6 this shows is that there was an incredible range. Obviously
7 there were many Asian-American applicants receiving very
8 strong personal ratings then and now.

9 Remembering of course that the ratings themselves
10 are just a beginning, you then have to go through the
11 process. And that the ratings themselves are simply again
12 not for a group, but it's looking at each individual at a
13 time.

14 And when each time, say, a reader is going through
15 an application, it's a little bit like a legal process
16 certainly. Or let's say if you're a baseball umpire or
17 something of that sort, what you're trying to do is look at
18 the evidence in front of you, evidence from outside sources,
19 you know, for example, from the teachers, from the counselor,
20 from all of the outside recommendations and all the other
21 outside information along with all the information provided
22 by the applicant.

23 And looking at that information on a case-by-case
24 basis, coming to some sort of a conclusion, again preliminary
25 conclusion, because a rating is only a preliminary step,

1 that's where you end up with these aggregate numbers.

2 **Q.** Do you think the difference between the 20 percent of
3 Asian-Americans that were receiving a 2 and the 25.5 of white
4 applicants who were receiving a 2, do you think that's a
5 significant difference?

6 **A.** It's a relatively small difference in the greater scheme
7 of things, keeping in mind that the personal rating is only
8 one of many, many factors that go into things, and that you
9 can certainly, if you took any other group, maybe let's say
10 Sparse Country people or students from my background,
11 first-generation students, you could find any number of
12 differences perhaps along any number of dimensions.

13 But as long as you get back to just keeping in mind
14 that any of these dimensions would only be one factor among
15 many as the committee looks at its applicants and then makes
16 its decisions.

17 **Q.** You told me before that you never had to sit down with a
18 Harvard admissions officer and tell them they were using race
19 inappropriately in the Harvard admissions process. You agree
20 with that, right?

21 **A.** I cannot think of any instance where that's occurred.

22 **Q.** And nothing in this report caused you to do that, right?

23 **A.** No. Simply looking, again, looking at the evidence in
24 front of us.

25 **Q.** And the 25 to 20 percent, that wasn't a concern to you.

1 You thought that was okay that Asian-Americans were receiving
2 that level of difference in the personal score back in 1990,
3 correct?

4 **A.** I think the big point was to ensure that we had a process
5 that looked at each individual; and took all the factors in
6 each individual's case into account; and have a process where
7 we ensured that it was really the evidence given by the
8 applicant him or herself as well as all the outside
9 information, which I won't detail just to save time. We
10 wanted to make sure that process was well in place.

11 **Q.** I want to look at a few additional things that OCR found,
12 Dean Fitzsimmons. I've got page 24 in front of you. Let me
13 read it and then I'll ask you some questions.

14 OCR says, "In addition to examining the ethnic
15 reader's comments, OCR's concerns for the potential
16 stereotyping of Asian-American applicants prompted a review
17 of reader comments for negative characterizations which could
18 have an impact on the admissions decision and ratings.

19 "On its face, reader comments revealed several
20 recurring characterizations attributed to Asian-American
21 applicants. Quite often Asian-American applicants were
22 described as being quiet, shy, science/math oriented, and
23 hard workers. For example, one reader's comment embraced all
24 of these in describing an Asian-American applicant when she
25 wrote: 'Applicant seems like a reserved, hard-working,

1 aspiring woman scientist/doctor.'

2 "While such descriptions may not seem damaging, OCR
3 was conscious that problems of model minority stereotypes
4 could negatively impact Asian-Americans applicants as a
5 whole. This concern was also raised when OCR's file review
6 came upon comments such as, 'He's quiet and of course wants
7 to be a doctor'" --

8 Let me go to the next page.

9 -- "suggesting that most or all Asian-American
10 applicants want to be a doctor. Or more pointedly,
11 applicant's scores and application seem so typical of other
12 Asian applications I've read: Extraordinarily gifted in math
13 with the opposite extreme in English."

14 These were all findings by OCR, correct?

15 **A.** That's correct.

16 **Q.** Do any of the statements that your admissions officers
17 made that I've just read to you, do any of those concern you?

18 **A.** Yes. And I think one of the things we have made a point
19 of doing, certainly since receiving this report, is making
20 certain that staff members just simply do what we want them
21 to do. And that is, go through the evidence contained in the
22 teacher reports, the counselor reports, and the outside
23 recommendations on which to base their ratings.

24 And I think one of the things to remember is that
25 the teacher recommendations and the counselor

1 recommendations, as you know, are certainly an important part
2 of the application. And to the extent to which information
3 might be conveyed from those reports and the others, that
4 could affect how an individual reader may do the write-up.

5 **Q.** But to be clear, you didn't sit down with any of your
6 admissions officers after this report came out and say stop
7 doing this, stop using race this way, stop making these
8 stereotypical comments. You didn't do that, right?

9 **A.** That's not right. We took the report very, very
10 seriously, and we shared the report obviously with our staff
11 members and discussed the report in detail. It was obviously
12 a very important report for the admissions committee members
13 and really for the general public to be aware of.

14 And it continues to be -- the OCR report continues
15 to be an important benchmark for us to make certain that we
16 do exactly what we said -- what the *Bakke* decision and what
17 was outlined here, and then what was outlined certainly in
18 any of the studies done.

19 **Q.** I just want to make sure you're not changing what you've
20 told me before.

21 You never sat down with an admissions officer and
22 told them they were using race in the wrong way in your
23 process, correct?

24 **A.** I'm not sure the image of, say, me or anyone else on the
25 staff sitting down with an individual admission officer --

1 for one thing, I'm not even sure who might have said these
2 kinds of things.

3 The point is that the entire staff, not just an
4 individual admission officer, the entire staff certainly
5 studied this report very, very carefully to make certain that
6 it did not engage in any racial stereotyping but rather
7 looked carefully at the evidence in each application.

8 But it's not simply talking with individuals. It
9 was really talking with the entire admissions committee and
10 future admissions committees.

11 **Q.** Dean Fitzsimmons, do you think that the stereotypical
12 comments which OCR quoted here are consistent with using race
13 with Harvard's guidelines?

14 **A.** This is not -- I'm not quite sure what you mean by
15 consistent with guidelines.

16 **Q.** Are these stereotypical comments that OCR found your
17 admissions officers made, are those comments consistent with
18 the way Harvard wants race used in its admissions process?

19 **A.** We do not endorse, we abhor stereotypical comments. This
20 is not part of our process. This is not who I am, and it's
21 not who our admissions committee members are.

22 **Q.** Dean Fitzsimmons, now I want to fast-forward to 2012.
23 We've looked at a number of things from 1990 that relate to
24 Harvard's use of race in its admissions process in this OCR
25 report, correct?

1 **A.** That's correct.

2 **Q.** We looked at the four categories of ratings; we looked at
3 these comments; we looked at the issue of instructions;
4 correct?

5 **A.** That's correct.

6 **Q.** And do you believe that OCR's 1990 description of how
7 Harvard uses race in its admissions process is still accurate
8 in more recent times, say like 2012?

9 **A.** Again, I'm not exactly sure which aspect of the policy.
10 But in general terms, certainly the OCR report has been
11 important to us.

12 **Q.** Do you think that a description of how Harvard uses race
13 in the -- do you think the description of how Harvard uses
14 race in the 1990 OCR report is still accurate?

15 **A.** The general -- certainly the general description and the
16 outlining, yes.

17 **Q.** Yesterday we looked at Plaintiff's Exhibit 509. It's
18 already admitted. I'll put it back on the screen. Just to
19 remind you, I've got it on the screen, but Dean Fitzsimmons,
20 you're certainly welcome to look at it in the binder.

21 Again, this is the 2012 letter from Harvard office
22 of general counsel to OCR. You recall talking about that
23 document with me yesterday?

24 **A.** I do.

25 **Q.** You were copied on it, and it's dated February of 2012,

1 correct?

2 **A.** That's correct.

3 **Q.** Turn to the second page of the document. This is
4 Harvard's office of general counsel, and I'll just read this
5 and ask you some questions.

6 "In no way did Harvard subject" -- and then there's
7 a redacted name -- "to different treatment in the admissions
8 process on the basis of national origin as the complaint
9 alleges. As you know, OCR has in the past conducted an
10 extensive compliance review of Harvard College admissions
11 process particularly with respect to Asian-American
12 applicants."

13 And then it references the compliance review that
14 we just looked at, correct?

15 **A.** That's correct.

16 **Q.** It goes on to say, "As OCR reported to Harvard at the end
17 of that review, we found no evidence of the existence or use
18 of quotas, nor did we find that Asian-Americans were treated
19 differently than white applicants in the implementation of
20 the admissions process."

21 That was the ultimate finding in the letter from
22 Mr. Hibino, correct?

23 **A.** That's correct.

24 **Q.** And then Harvard office of general counsel goes on to
25 say, "The information that OCR gathered during the course of

1 that compliance review and in subsequent cases regarding
2 Harvard College's criteria for admission, its use of race as
3 a factor in admissions decisions, and its general policies
4 and procedures for selecting students for admission to its
5 undergraduate program is still accurate today."

6 Do you see that?

7 **A.** I do.

8 **Q.** So do you agree that the way Harvard runs its admissions
9 process in terms of how Harvard uses race as a factor in
10 admissions is the same as it was in 1990 today?

11 **A.** I do.

12 **Q.** So does that -- would you then admit that based on what
13 OCR found in 1990 that it's at least possible that a group of
14 your admissions officers are using race in awarding the
15 personal score along the lines that OCR found in 1990? Is
16 that possible today?

17 **A.** I don't know. I think -- I doubt it. But what I would
18 say, though, is again the OCR report is certainly something
19 that our office is well aware of, continues to be well aware
20 of, as this sentence indicates.

21 **Q.** All right. I'm going to move on from OCR for now, Dean
22 Fitzsimmons.

23 Before this case, before this lawsuit, had the
24 admissions office ever conducted any empirical research into
25 whether Harvard admissions officers used race or ethnicity in

1 awarding personal scores?

2 **A.** I'm not aware of any research that looked at that
3 specifically. It's possible that there was some other sets
4 of things. You'd have to show me.

5 **Q.** Nothing comes to mind?

6 **A.** No.

7 **Q.** So you do recognize that as a result of this case the
8 experts have conducted some empirical research based on data
9 that was produced from your admissions office, correct?

10 **A.** That's correct.

11 **Q.** You understand the admissions office produced data for
12 six admission cycles, correct?

13 **A.** That's correct.

14 **Q.** And that data included data about students that were
15 admitted and students that were not admitted, correct?

16 **A.** That's correct.

17 **Q.** It had information like GPA and SAT scores and all of the
18 different ratings that we've talked about, correct?

19 **A.** That's correct.

20 **Q.** And it had information, to the extent it was provided, by
21 the applicants about race or ethnicity, correct?

22 **A.** That's correct.

23 **Q.** And in fact, I want to put Plaintiff's Exhibit 316 back
24 on the screen. It's the race-neutral alternative report
25 that's already been admitted into evidence. We'll put page 2

1 up on the screen. Let me just read that to you, Dean
2 Fitzsimmons. You're welcome to follow along on paper on the
3 screen. It's page 2.

4 Harvard's report says, "In 2014, Harvard convened a
5 universitywide committee chaired by James Ryan, dean of the
6 graduate school of education. That committee was charged
7 with examining the importance of student-body diversity at
8 the university and with evaluating whether the university
9 could achieve the educational benefits of a diverse student
10 body without considering the race or ethnicity of its
11 applicants.

12 "That committee paused its work when Students for
13 Fair Admissions, Inc., SFFA, filed a lawsuit against Harvard
14 challenging Harvard College's consideration of race in
15 undergraduate admissions. Recognizing that the litigation
16 would include an extensive discovery process in which experts
17 would conduct in-depth empirical analyses of the college
18 admissions process and proposed changes to it, Harvard
19 decided to evaluate whether it could achieve the educational
20 benefits of diversity without considering race in admissions
21 in the college in a way that would be informed by the
22 race-neutral alternatives proposed in the SFFA complaint and
23 the analysis of those and other alternatives anticipated to
24 be prepared by the parties' expert witnesses."

25 That's what your reports says, correct?

1 **A.** That's correct.

2 **Q.** I want to march through and unpack that a little bit.

3 What was the Ryan committee?

4 **A.** The Ryan committee was chaired by Jim Ryan, who was the
5 dean of the graduate school of education at that time. He is
6 now the president of the University of Virginia. And he
7 convened this committee, as the statement indicates.

8 **Q.** And it was convened in 2014?

9 **A.** Right, that's correct.

10 **Q.** How many people were on the Ryan committee?

11 **A.** I'm not sure exactly. I'm just trying to recollect.
12 Perhaps ten people, maybe more. It was very brief.

13 **Q.** You were one of the people?

14 **A.** I was one of the people. And obviously -- and a lot of
15 people on the committee, like me, have lots of other
16 conflicting meetings and so on.

17 **Q.** So the record is clear, you were one of the people on the
18 Ryan committee, correct?

19 **A.** I was, yes.

20 **Q.** And what happened was after that committee kind of first
21 got started, but this lawsuit was filed in the fall of 2014,
22 so the work on the committee was stopped at that time,
23 correct?

24 **A.** That's correct.

25 **Q.** Was that your decision to stop that work?

1 **A.** It was not my decision.

2 **Q.** So the Ryan committee at that point was effectively
3 disbanded while Harvard waited for the empirical analysis to
4 be conducted by the parties' respective experts in this case,
5 correct?

6 **A.** That's my understanding.

7 **Q.** And then a new committee to study race-neutral
8 alternatives was formed after that, correct?

9 **A.** That's correct.

10 **Q.** The purpose, just so it's clear, the purpose of the Ryan
11 committee was to study race-neutral alternatives. It really
12 didn't get off the ground. We had the lawsuit, the work of
13 the experts, and then a new committee was formed that
14 included yourself, Dean Smith, and Dean Khurana, correct?

15 **A.** That's correct.

16 **Q.** So only three members on the new committee, correct?

17 **A.** That's correct.

18 **Q.** Did you make the decision about who to staff on the
19 committee that you participated in?

20 **A.** I did not.

21 **Q.** But what you definitely were anticipating was to look at
22 some of the empirical evidence that would be generated as a
23 result of the analysis done in this case about the admissions
24 data that you provided, correct?

25 **A.** That would certainly be one of the things we would want

1 to look at.

2 **Q.** Now I'd like to show you a page of Dr. Card's expert
3 report, his first report, which I think Mr. Lee has a copy
4 of. I'll show you page 37.

5 **MR. LEE:** I think the witness is looking for it in
6 the binder.

7 **THE WITNESS:** What page?

8 **BY MR. HUGHES:**

9 **Q.** It is not in your binder, Dean Fitzsimmons, but I
10 actually do have a paper copy which I'm happy to walk up to
11 you or we can look at it on the screen. I defer to you, sir.

12 **A.** The screen is fine for me. I don't want to anticipate
13 another fire drill or something.

14 **Q.** I've got it here if you want it. Just let me know.

15 **A.** Should I ask counsel --

16 **MR. LEE:** Yeah. If he could have a hard copy.

17 **A.** -- maybe to see the whole context. They would know
18 better than I.

19 **BY MR. HUGHES:**

20 **Q.** Here you go, sir. The only thing I'm going to ask you
21 about is what I have on the screen. So what I've got on the
22 screen is page 36 of Dr. Card's report. And we've got
23 Exhibit 8 to the report, and it's entitled, "White and
24 Asian-American Applicants Excel At Different Dimensions:
25 Percentage of Applicants With Ratings of 2 Or Better."

1 Do you see that on the screen in front of you, Dean
2 Fitzsimmons?

3 **A.** I do.

4 **Q.** So the only two ethnicities we've got on here are
5 Asian-American and white, correct?

6 **A.** That would be correct.

7 **Q.** And if we look at academic ratings, we see -- let me ask
8 you a new question just to orient you.

9 The red bars relate to Asian-American applicants,
10 correct?

11 **A.** That's correct.

12 **Q.** And the blue bars relate to white applicants, correct?

13 **A.** That's correct.

14 **Q.** And you reviewed Dr. Card's report as part of your duties
15 on the race-neutral alternative committee, right?

16 **A.** Yes, that's correct.

17 **Q.** And we've got -- along the left-hand side, we've got the
18 percentage of the applicant pool that gets these scores of 2
19 or better. You see that over here, correct?

20 **A.** I do.

21 **Q.** Okay. And then Dr. Card has helpfully provided the
22 aggregate number of students on each of the bars, correct?

23 **A.** Yes.

24 **Q.** And so what we've got for -- and again, this is Harvard's
25 expert, right?

1 **A.** That's correct.

2 **Q.** And so just we'll go through here. On the academic
3 rating, it looks like almost 60 percent --

4 MR. LEE: Your Honor, I am going to object now.
5 The tie to this is his review of the report for race-neutral
6 alternatives. I don't think this has anything to do with
7 race-neutral alternatives. And cross-examining this witness
8 on Dr. Card's report when Dr. Card is going to be here
9 doesn't seem to be either appropriate or a good use of our
10 time.

11 MR. HUGHES: With respect, Your Honor, this is --
12 what I just showed him from his race-neutral alternative
13 report talked about anticipating empirical analysis of his
14 admissions process. This is that empirical analysis.

15 He has been the dean of the admissions process for
16 32 years, and I think it's perfectly appropriate to confront
17 him and ask him questions with the basic pretty simple to
18 understand output of those empirical analysis to see if he
19 has helpful testimony or information to provide on those
20 subjects.

21 MR. LEE: Your Honor, when he cross-examined on the
22 other chart, it dealt with the impact of the race-neutral
23 alternatives on different ethnicities. I didn't object
24 because that was related to the report.

25 But Dr. Card's report runs hundreds of pages, much

1 of which has nothing to do with the RNAs, including this. I
2 just think cross-examining a fact witness on the expert
3 report of an expert witness who's going to be here to
4 testify --

5 THE COURT: I'm not sure where he's going with it.
6 If what he wants to ask is were you aware of these things and
7 did you take steps in response to it, that's fair game.
8 Right? But to cross-examine on how he got to these numbers
9 and what they mean is not fair game.

10 MR. HUGHES: I have absolutely no intention of
11 doing that, Your Honor. I am going to ask him whether what
12 Dr. Card is showing here is consistent with what he knows,
13 given his long experience in the admissions process. And I'm
14 going to ask him if he has explanations, for example, for the
15 difference in the personal score rating that Dr. Card is
16 showing here on his chart, based on his experience as the
17 dean of admissions office for 32 years.

18 I'm not going to ask him how he got to these
19 numbers or whether the numbers are right or whether
20 Dr. Card's opinions are valid. I have no plan to get into
21 any of that.

22 I would actually be happy to skip this and move to
23 a different piece of empirical evidence that I'll put up
24 right now, which is Plaintiff's Exhibit 629. And this is not
25 from an expert report.

1 MR. LEE: I object. There's no foundation for this
2 at all. This witness has not seen this document before.
3 It's not been before him before.

4 Your Honor, if I could very briefly?

5 THE COURT: Yes.

6 MR. LEE: There are two things here. The witness
7 has reviewed the Card reports for the purpose of the RNA
8 committee. That doesn't mean that everything that's in those
9 reports that deal with a whole host of other issues would be
10 fair game for cross.

11 THE COURT: That first question about whether the
12 report is consistent with what he knows based on his
13 experience, that is fair game, in my opinion. However wrong
14 you think I have it, I think that question is a fair
15 question. We'll see what his answer is.

16 I don't know how much further beyond that you go.
17 You can ask him what his familiarity is, but if there's no
18 foundation for asking him questions on 629 --

19 MR. HUGHES: If I may be heard on this one.

20 THE COURT: Yes.

21 MR. HUGHES: 629 is not part of the expert analysis
22 in the case. What 629 is, is a summary-of-evidence exhibit
23 that summarizes the evidence produced by Dean Fitzsimmons'
24 admissions office, and it's an un-objected to exhibit in
25 terms of its admissibility. It was used in opening

1 yesterday.

2 I plan to try to walk through with the witness the
3 basic structure of it. But I think given the importance of
4 whether race is used in the personal score, given that Dean
5 Fitzsimmons has been the dean for 32 years and given that
6 this is an unobjected-to summary-of-evidence exhibit, based
7 on the data that they've produced, I'd like to see, and I
8 think it would be helpful to the Court, whether Dean
9 Fitzsimmons has any explanation for what we're seeing in
10 P629, which to me plainly shows --

11 MR. LEE: Wait a minute. Let's not talk in front
12 of the witness, which plainly shows to you --

13 THE COURT: You make an excellent witness,
14 Mr. Hughes, but that's not your job here.

15 MR. LEE: First, could we have this taken down?

16 THE COURT: Take this down. You can go back to the
17 other exhibit, and you can ask him if the information in that
18 exhibit is consistent with what he has observed, if you still
19 want to ask that question. And then we'll see where he goes
20 and what the next question is.

21 MR. LEE: And, Your Honor, this summary chart is
22 from -- this is from their expert, Dr. Arcidiacono. His
23 report was not reviewed in connection with the RNA.

24 THE COURT: When we get to that, he can ask him
25 about that exhibit. And if he hasn't seen it and doesn't

1 have any basis for understanding the accuracy of it, then
2 he's not going to be asked questions about that.

3 MR. HUGHES: On 629.

4 THE COURT: On 629.

5 MR. HUGHES: Understood, Your Honor.

6 THE WITNESS: I'm sorry. What's the question?

7 BY MR. HUGHES:

8 **Q.** At least the fire alarm didn't go off.

9 **A.** I'm ready.

10 **Q.** So now I've got page 36 of Dr. Card's report. And we had
11 kind of been walking through the basic structure of the bar
12 graph. You recall our conversation there, sir?

13 **A.** I do. He's using Arcidiacono's data. Is that the idea?

14 **Q.** Yes. Everybody but the athletes, but yes.

15 **A.** Which, again, I think would be important. In our world,
16 we look at everybody simultaneously together year by year.
17 But I'll leave that aside.

18 THE COURT: Can I interrupt for one second?

19 What is this last category, three or more profile
20 ratings? What is that category?

21 MR. HUGHES: I have no intention of asking Dean
22 Fitzsimmons about that category because that has to do with
23 some analysis and calculation done by Dr. Card, which he can
24 probably explain better than I can.

25 THE COURT: Okay.

1 THE WITNESS: And better than I can.

2 BY MR. HUGHES:

3 Q. We're on the same team on that one, Dean Fitzsimmons.

4 If we focus on the academic rating, we see that
5 Asian-Americans as a group, about 60 percent of the
6 Asian-Americans that apply to Harvard receive a 2 or higher
7 on the academic score, correct?

8 A. That's correct.

9 Q. And for a total number of almost 25,000, correct?

10 A. That's correct.

11 Q. And would you agree with me that on average in a given
12 admissions cycle, about twice the number of white applicants
13 apply to Harvard as Asian-American applicants?

14 A. I would have to see the figures. That sounds reasonable,
15 but I don't want to guess because I don't have the figures in
16 front of me.

17 Q. And coming back to the chart here, the percentage of
18 white applicants that get a 2 or higher is less than
19 50 percent, correct?

20 A. That's correct.

21 Q. And about 3,700, 3,800 more white applicants than Asians,
22 correct?

23 A. That sounds right.

24 Q. And is the relative strength of the Asian-American
25 applicant pool in terms of academics consistent with -- does

1 that look right to you, based on your experience as the dean
2 of the Harvard admissions office?

3 **A.** Yes. And just to remind you, so these are ratings that
4 the admission officers themselves created based on the
5 evidence in the file. And just reminding you that even in
6 the academic realm, we would argue that it's not objective in
7 any literal sense, that there's lots of things.

8 And so the judgment made by individual admission
9 officers looking at individual cases, that it was their
10 judgment that produced this kind of difference. It looks
11 like a reasonable difference though.

12 **Q.** And some of the things that go into the academic score,
13 one of the things is standardized test scores, correct?

14 **A.** That would be part of it certainly.

15 **Q.** And based on your experience in the admissions office,
16 would you agree that Asian-Americans as a group outperform
17 white applicants to Harvard on standardized test scores?

18 **A.** Standardized tests are higher for Asian-Americans.

19 **Q.** Grade point average, that's another component, one
20 component of the academic score, correct?

21 **A.** That's correct.

22 **Q.** Would you agree that Asian-Americans as a group tend to
23 get higher grade point averages than white applicants?

24 **A.** Yes.

25 **Q.** So there's a number of things that go into the academic

1 score, I think is what you're trying to tell me, correct?

2 **A.** I am. Including things such as faculty readings and all
3 kinds of things.

4 **Q.** Are the teacher and guidance counselor ratings another
5 thing that your admissions officers consider when determining
6 the academic score?

7 **A.** Very much so.

8 **Q.** And so would you agree that based on the data that we
9 have here in front of you that Asian-Americans as a group get
10 better support from their teacher recommendations and
11 guidance counselors?

12 **A.** Again, that's one of the factors that go to the rating.
13 As the admission officers compile the ratings for an
14 individual, they're taking all those factors into account,
15 including the teacher recommendations.

16 **Q.** Yeah. I'm just trying to go through each of the factors
17 with you, sir.

18 **A.** Right.

19 **Q.** So the question is, would you agree that based on what we
20 see here in Dr. Card's analysis that Asian-Americans as a
21 group are getting better teacher recommendations, more
22 support from guidance counselors?

23 MR. LEE: I object.

24 THE COURT: Sustained.

25 BY MR. HUGHES:

1 **Q.** Do you think that Asian-Americans as a group are more
2 competitive in terms of the high school curriculum they take,
3 based on your experience in the Harvard admissions office?

4 **A.** I don't have data on that, and it doesn't demonstrate
5 here. Could be.

6 **Q.** Do you think that Asian-Americans as a group, based on
7 your experience in the Harvard admissions office, take more
8 advanced placement exams than white applicants?

9 **A.** I don't have data on that. It could be.

10 **Q.** Let's move on to the extracurricular bar graphs here. We
11 see that the Asian-American applicants are slightly stronger
12 in terms of the percentage of the applicant pool that gets a
13 2 or better than white applicants, correct?

14 **A.** Yes. Again, that are rendered by the admission officers.

15 **Q.** And that's based on the information that the applicants
16 are provided about their participation in various
17 extracurricular activities. That's one data point for your
18 admissions officers, correct?

19 **A.** Yes.

20 **Q.** And also get information probably from teachers and
21 guidance counselors and so forth, correct?

22 **A.** Yes. As you know, everything in the application would be
23 looked at to help compile the extracurricular rating.

24 **Q.** And your admissions officers aren't using race when
25 they're awarding extracurricular or academic scores, right?

1 **A.** That's correct.

2 **Q.** Now, when we move on -- they're just looking at the data,
3 the information that's provided in the application, correct?

4 **A.** Just looking at the evidence.

5 **Q.** And then if we move on to personal rating, there we see
6 that this relationship shifts where the white applicants to
7 Harvard are more likely to receive a personal rating of 2 or
8 greater than Asian-American applicants, correct?

9 **A.** That's correct.

10 **Q.** And based on your experience as the dean of Harvard
11 admissions office, you don't think that Asian-Americans have
12 fewer attractive personal qualities than whites or any other
13 group, right?

14 **A.** I would certainly agree with that.

15 **Q.** And so based on your experience as the dean of the
16 Harvard admissions office, do you have any explanation for
17 why whites are more likely, according to Dr. Card, to get a
18 personal score rating of 2 or greater than Asian-American
19 applicants?

20 **A.** Well, as I said in my deposition, there's no way when
21 you're looking at the whole person to know for certain, you
22 know, to come up with a definitive answer.

23 But you know, the one thing we do know, for
24 example -- and again speculation, but it's a fact that the
25 strength of the teacher recommendations and the counselor

1 recommendations for whites is somewhat stronger than those
2 for Asian-Americans. That could be one factor. But again
3 when an admission officer is going through an application,
4 they're looking at everything.

5 **Q.** How do you know that the strength of teacher
6 recommendations is somewhat stronger for Asian-American
7 applicants than white applicants?

8 **A.** We simply know that because it's our office and we're in
9 the business and there's evidence of it.

10 **Q.** We're done with that.

11 MR. LEE: For clarity of the record, could I have
12 the question back?

13 MR. HUGHES: I had it flipped.

14 MR. LEE: You had it flipped. You had it stronger
15 for Asian-Americans than for whites as opposed to the
16 reverse.

17 MR. HUGHES: I don't even remember what the
18 question was. I'm prepared to move on unless you want me to
19 try to reconstruct my question.

20 MR. LEE: I said it on the record. I think that's
21 what was intended, and the answer is clear.

22 THE COURT: He did. He got it backwards, but I
23 actually got it right in my notes.

24 THE WITNESS: The strength of the recommendation
25 for whites are stronger than for Asian-Americans.

1 BY MR. HUGHES:

2 Q. Harvard computes for each of its applicants, at least for
3 as many as it can, an academic index score, correct?

4 A. That's correct.

5 Q. And is part of the reason that Harvard computes that
6 academic index score is it gets reported out to the Ivy
7 League, right?

8 A. Yes, to the Ivy League.

9 Q. I don't think we need to get into the precise contours of
10 the equation, but the academic index, the score, is based on
11 a combination of standardized test scores and grade point
12 average; is that right?

13 A. That's correct.

14 Q. And the highest score you can get on an academic index is
15 a 240, correct?

16 A. That's correct.

17 Q. Perfect score?

18 A. Perfect everything.

19 Q. So that would mean 800 on your SATs, both of them, and
20 really good grades?

21 A. That's correct.

22 Q. And I think the lowest you can get is 60, right?

23 A. Never seen one, but I'll take your word for it.

24 Q. And do you have any reason -- can you give us any reason
25 why applicants to Harvard with comparable academic index

1 ratings --

2 You understand that concept?

3 **A.** Yes.

4 **Q.** Let's say you had 10,000 applicants to Harvard, and they
5 all had comparable academic index rating.

6 **A.** Okay.

7 **Q.** Do you have that you in mind? And let's say we divvy
8 them up by race, ethnicity, so we've got white,
9 Asian-American, African-American, Hispanic.

10 Do you have that in mind?

11 **A.** I do. Do you have an exhibit?

12 **Q.** I do have an exhibit that shows that, that I would very
13 much like to show you, which is P629, which I'll put on the
14 screen and we'll see how we do.

15 MR. HUGHES: But this is the subject of our prior
16 conversation with Your Honor.

17 MR. LEE: If he wants to put it on the screen and
18 ask the witness if he's ever seen it before.

19 THE COURT: That's fine.

20 BY MR. HUGHES:

21 **Q.** So, Dean Fitzsimmons, I've got on the screen P629. Do
22 you have that in front of you on the screen?

23 **A.** I have. But I haven't seen it before.

24 **Q.** Just let me ask you. You were here during Mr. Mortara's
25 opening statement, right?

1 **A.** I was.

2 **Q.** Do you remember seeing this during Mr. Mortara's opening
3 statement?

4 **A.** Ever so briefly, and I was in the very back.

5 MR. HUGHES: Ruling?

6 THE COURT: You can't ask him to interpret this
7 exhibit. But if these numbers mean something to him and they
8 happen to be displayed to him on this exhibit, that's fine.
9 But if the numbers don't mean anything to him, I'm not going
10 to ask him to sit up there and try to do an analysis.

11 MR. HUGHES: Let me try to baby step it.

12 THE COURT: Okay.

13 BY MR. HUGHES:

14 **Q.** You see at the very top, I'll just highlight this row,
15 Dean Fitzsimmons, we've got academic index range between 236
16 and 240.

17 Do you see that?

18 **A.** I do. Again, I have never worked with this data in such
19 a way before, so it's a bit unfamiliar.

20 THE COURT: Let me just ask you, have you ever
21 broken down the academic index range by ethnicity?

22 THE WITNESS: Have I?

23 THE COURT: Or have you looked at data that breaks
24 down the academic index range by ethnicity, either yourself
25 or compiled by someone else?

1 THE WITNESS: I have not.

2 THE COURT: That closes that avenue for you.

3 BY MR. HUGHES:

4 Q. Do you have any explanation, Dean Fitzsimmons, for why
5 applicants with comparable academic index scores receive
6 significantly different personal scores based on ethnicity?
7 Do you have any explanation for why that is a result from the
8 process in your admissions office?

9 A. I don't want to be repetitive, but I would simply just go
10 back to the idea that we do look at everything, when
11 everybody individual has a personal rating compiled and
12 recorded.

13 The one thing that, you know, I can say is that the
14 strength of the support from the teachers and the counselors
15 is less strong for Asian-Americans than for whites. Just
16 again looking at those reports, which are important. Beyond
17 that, we're simply looking at everything else as well.

18 Q. The strength of the teacher-supported recommendations for
19 Asian-American applicants is stronger than it is for Hispanic
20 and African-American applicants, correct?

21 A. I am not sure of that.

22 Q. You don't know the answer to that one way or the other?

23 A. I don't.

24 MR. HUGHES: Your Honor, I'm at a perfect breaking
25 point, and it's almost 1:15.

1 THE COURT: That's fine. It's exactly 1:15. We
2 will resume tomorrow at 10:00 unless anyone feels they want
3 to make up some of the time we lost today, in which case I'm
4 happy to start at 9:30.

5 MR. HUGHES: Mr. Lee, I defer to you and Dean
6 Fitzsimmons.

7 THE COURT: Tomorrow I can sit until 3:30. So
8 10:00 to 3:30 seems like a perfectly reasonable day to me,
9 but if you -- if people feel like we're getting behind, I'm
10 happy to start at 9:30.

11 When we're thinking about that, we had an hour for
12 lunch yesterday. Do you all want to keep going with an hour?
13 Do you want do shorten it up?

14 MR. LEE: I think two things. Our view, I think it
15 would be great if we could start at 9:30 tomorrow so we can
16 get the dean on and off and get to some other witnesses. I
17 think for us, if it's all right to the Court and everybody
18 else, 45 minutes for lunch probably does it.

19 MR. HUGHES: I'm perfectly happy to start at 9:30,
20 and as short of a lunch break as we can take for our team is
21 fine. 45 minutes seems reasonable.

22 THE COURT: We'll start at 9:30 tomorrow, and we'll
23 take a 45-minute break, and that will at least get us part
24 way made up for the time we lost today.

25 I think you all know you have three weeks, and I

1 start another trial after that. So we'll use these three
2 weeks any way you want. However long you want to sit,
3 however long you want lunches to be, just let me know. To
4 the extent that I can be here, I'll be here. We're trying to
5 move some of these late-afternoon things to even later so we
6 can make up some of that time at the end of the day, too.

7 MR. HUGHES: I can tell you in terms of the
8 duration of the presentation of evidence from our side's
9 perspective, once we finish with Dean Fitzsimmons, the pace
10 will pick up considerably in terms of how long we're spending
11 with Harvard's witnesses. Of course the experts will be a
12 little bit of a different story.

13 THE COURT: I'm not trying to rush you at all. I
14 just want to make sure we get everything done in the time
15 that we need to get it done. I notice everybody always
16 stands up and says I'm going to be brief. I'm really not
17 trying to rush anybody. But I to want to make sure that we
18 get as much time in as we need in the next three weeks,
19 because that's really kind of what we have.

20 I'll see you at 9:30 tomorrow morning. We'll take
21 a 45-minute lunch break.

22 MR. LEE: Thank you, Your Honor.

23 (Court recessed at 1:18 p.m.)
24
25

CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

October 16, 2018

Date

INDEX OF WITNESSES

WITNESSPAGE

WILLIAM FITZSIMMONS

Direct Examination (Resumed) by Mr. Hughes..... 7

E X H I B I T S

Plaintiff ExhibitReceived

1	12
316	32